

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ALCIDES ARISTIZABAL,

95 CV 1109

Plaintiff,

MEMORANDUM

-against-

AND

ORDER

SHIRLEY S. CHATER, Commissioner
of Social Security,

Defendant.

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ARNOLD S. COHEN

QUEENS LEGAL SERVICES CORPORATION

(Daniel Kuhn, of counsel)

42-15 Crescent Street, 9th Floor

Long Island City, New York 11201

for plaintiff.

ZACHARY W. CARTER, United States Attorney

(Beth P. Schwartz, of counsel)

One Pierrepont Plaza, 14th Floor

Brooklyn, New York 11201

for defendant.

NICKERSON, District Judge:

Plaintiff brought this action under 42 U.S.C.
§ 405(g) to challenge the Commissioner of Social
Security's determination that he was not under a
disability. On December 9, 1996 this court remanded
the case to the Commissioner for further proceedings

upon a fuller development of the record. Plaintiff then moved for an award of attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (the Act). The court granted plaintiff's motion for attorneys' fees on July 29, 1997, awarding plaintiff's counsel a total of \$4,533.53.

The Commissioner now moves pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from the court's July 29, 1997 order granting attorneys' fees.

The Act provides that the court "shall award to a prevailing party" in a suit against the United States to review agency action fees and other expenses, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 42 U.S.C. § 2412(d)(1)(A).

At the time of the court's July 29, 1997 order the Commissioner did not dispute the fact that plaintiff was the prevailing party, see Shalala v. Schaefer, 509 U.S. 292, 113 S. Ct. 2625, 2631-32 (1993) (plaintiff

who obtains a remand pursuant to sentence four of 42 U.S.C. § 405(g) is "prevailing party"), and that the Commissioner's position was not substantially justified. See Tricholo v. Sec'y of Health & Human Servs., 823 F.2d 702, 708 (2d Cir. 1987) (government position not substantially justified if underlying agency action not justified).

The only question addressed by the court in its July 29, 1997 order was whether the amount of attorneys' fees requested, \$4,596.81, was reasonable. After factoring in the consumer price index for the months during which plaintiff's attorney worked on the case, the court awarded a total of \$4,533.53.

On the present motion the Commissioner argues again that plaintiff's counsel spent hours of unsuccessful and unnecessary work moving for judgment on the pleadings after the Commissioner had stipulated to a remand. The court has already considered and rejected these arguments in its July 29, 1997 order. The motion for relief is denied.

Plaintiff in its opposition papers also seeks to amend its request to include an additional \$551.45, which represents two hours spent on its reply memorandum filed on March 31, 1997, and two hours spent preparing its memorandum in opposition to the present motion. Plaintiff says that the hours spent on the March 31, 1997 papers "may have been inadvertently omitted" at the time it made its first request. The court will not amend the award at this stage. Plaintiff's request is denied.

The Commissioner's motion for relief from the \$4,533.53 award of attorneys' fees is denied.

So ordered.

Dated: Brooklyn, New York
June 11, 1998

Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.